Nos. 648-658

In the Supreme Court of the United States

October Term, 1943

RALPH W. CREWS, PETITIONER

v.

GUY T. HELVERING, Commissioner of Internal Revenue

RAYMOND R. CREWS, PETITIONER

v.

GUY T. HELVERING, Commissioner of Internal Revenue

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In the Supreme Court of the United States

OCTOBER TERM, 1941

NOS. 548–553

RALPH W. CREWS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ROBERT E. CREWS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

AMY TRESNER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

CHARLES CREWS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

EVERETT J. CREWS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

MARY WILLIS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Board of Tax Appeals wrote no opinion with respect to the issue raised by the petition for writs of certiorari. The opinion of the Circuit Court of Appeals (R. 102–106) is reported at 120 F. (2d) 749.[1]

JURISDICTION

The orders of the Circuit Court of Appeals were entered June 3, 1941 (R. 106–107). The petition for writs of certiorari was filed August 25, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In the particular circumstances of this case, was the period for seeking review by the Circuit Court

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[1] There are other opinions in these cases as follows: B. T. A. opinion of May 2, 1934 (R. 48–54), reported at 30 B. T. A. 615; B. T. A. opinion of September 19, 1934 (R. 54), reported at 31 B. T. A. 187; B. T. A. opinion of September 18, 1935, reported at 33 B. T. A. 36; B. T. A. opinion of November 12, 1935 (R. 55–56), reported at 33 B. T. A. 441; Circuit Court of Appeals opinion of March 29, 1937, reported at 89 F. (2d) 412; B. T. A. opinion of February 23, 1938 (R. 68–75), reported at 37 B. T. A. 387; and Circuit Court of Appeals opinion of December 11, 1939, reported at 108 F. (2d) 712.

of Appeals of a decision of the Board of Tax Appeals governed by Section 1140 or by Section 1142 of the Internal Revenue Code?

STATUTE INVOLVED

Internal Revenue Code, U. S. C. Supp. V, Title 26, Secs. 1140–1142:

> SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.
>
> The decision of the Board shall become final—
>
> * * * * *
>
> (c) *Decision modified or reversed*—
>
> * * * * *
>
> (2) *Upon mandate of the Circuit Court of Appeals.* If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) *Rehearing.* If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall become final in the same manner as though no prior decision of the Board had been rendered.

* * * * *

SEC. 1141. COURTS OF REVIEW—

(a) JURISDICTION. The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, § 346); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, § 347).

* * * * *

SEC. 1142. PETITION FOR REVIEW.

The decision of the Board rendered after February 26, 1926 (except as provided in subdivision (j) of Section 283 and in sub-

division (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Board prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

STATEMENT

These cases concern the income tax liability of the petitioners, six brothers and sisters, for the year 1930. The litigation has been extensive, the cases having been before the Board of Tax Appeals three times, followed each time by an appeal to the court below. During the course of these proceedings, many different items in the complicated account of the taxpayers were considered by the Board and by the court below. For purposes of the present petition, however, only two items need be considered: a $173,000 deduction claimed by the taxpayers for litigation expenses, and a $177,343.70 item which the Commissioner determined was the value of an indemnity contract and assessed as income to the petitioners. This Statement will be limited to the facts necessary for an understanding of the situation with respect to these two items.

The taxpayers owned some oil property subject to an oil lease. A dispute arose between the taxpayers and the lessee as to whether the lessee had conducted operations in conformity with the lease agreement. During the course of the dispute, the money received for oil extracted from the property was placed in escrow. The dispute was compromised in 1930, the taxpayers being given the right to receive the escrowed funds, together with $355,000 in cash. The funds in escrow, however, had been embezzled and there was no possibility of recovery from the escrow agent. The only thing which the taxpayers received was an indemnity contract executed by officers of the escrow agent to cover the defalcation. The admitted expenses of the taxpayers in connection with the litigation resulting in the 1930 compromise and their attempt to recover the embezzled funds amounted to $173,000 (R. 49–51).

In their income tax returns for the year 1930, the taxpayers reported a net loss and therefore no income tax liability (R. 36, 51). The Commissioner, however, determined that the taxpayers had realized net income and assessed deficiencies accordingly (R. 52). In computing net income, the Commissioner included as an income item the amount of $177,343.70, which he determined was the value of the indemnity contract given to the taxpayers by the officers of the escrow agent (R. 37). He allowed the taxpayers a deduction of

$173,000 for litigation expenses (R. 38). He did not allow them any depletion deduction.

The taxpayers filed petitions for review with the Board of Tax Appeals (R. 32–35). The issues before the Board were as to the proper amount of gross income to be included and as to whether a depletion deduction should be allowed. In deciding those issues, the Board rendered four opinions (30 B. T. A. 615, R. 48–54; 31 B. T. A. 187, R. 54; 33 B. T. A. 36; 33 B. T. A. 441, R. 55–56), in the course of which it held, among other things, that the indemnity contract, valued by the Commissioner at $177,343.70, was worthless from the date of its execution (33 B. T. A. 36, 40). The Board further held, as the Commissioner had conceded in his computation, that the litigation expenses of $173,000 were properly deductible in determining net income (33 B. T. A. 36, 51).[2]

The taxpayers appealed to the Circuit Court of Appeals. That court affirmed the Board's decisions in the main but reversed and remanded the case for further proceedings on items not now in issue. In the course of its opinion, the Circuit Court of Appeals recognized both that the indem-

[2] The issue litigated before the Board with respect to this $173,000 item was whether it was deductible from the gross income realized from the oil property in determining the net income from the property for depletion purposes. The respondents contended that it should not be deducted; the Commissioner contended, and the Board held, that it should be (33 B. T. A. 36, 51).

nity contract was worthless from the date of its execution and that the taxpayers were entitled to a deduction for the $173,000 litigation expenses (89 F. (2d) 412).

Upon remand, the Board interpreted the mandate of the Circuit Court of Appeals as one for a new trial, receiving new evidence on one question not now in issue and revising its previous depletion computations (R. 68–75). Pursuant to the opinion of the Board on remand, the Commissioner submitted a proposed computation of the petitioners' tax liability (R. 75–78). This computation was based upon the net income as stated in the Commissioner's original deficiency letter (R. 35–38), without taking out of the account the income item of $177,343.70 for the indemnity contract which the Board had found to be worthless. In failing to take out this income item, the Commissioner's computation erroneously departed from the law of the case. However, the Board entered its decisions based upon the Commissioner's computation (R. 78).

The next step was an appeal to the Circuit Court of Appeals by the Commissioner, seeking review of the Board's determination of a depletion question not now in issue. The Circuit Court of Appeals reversed the Board on this question and remanded the case with instructions to the Board to redetermine the tax in accordance with the Circuit Court of Appeals' opinion on the depletion issue (108 F. (2d) 712).

On April 18, 1940, the Board entered its final decisions determining the tax recomputed in accordance with the last mandate of the Circuit Court of Appeals (R. 86). This determination was based directly upon a recomputation submitted by the Commissioner (R. 25–27), in which the only adjustment made in his previous computation which the Board had approved was a decrease in the depletion allowance in accordance with the Circuit Court of Appeals' second opinion (R. 26). On July 5, 1940, the taxpayers again appealed to the court below, contending, alternatively, that the $177,343.70 item had been erroneously included in taxable income, and that they had been denied a deduction for the $173,000 litigation expenses. As appears from the facts above stated, the error of including the $177,343.70 item had been made in the decisions of the Board upon the first remand of the case; the Board's decisions upon the second remand simply changed its earlier decisions in the one respect (depletion) in which it had been instructed to change them by the second mandate of the Circuit Court of Appeals. As also appears from the facts above stated, the petitioners had been allowed a deduction of $173,000 for litigation expenses in the Commissioner's original deficiency letter, and the computation in this letter served as the basis for all subsequent computations; in no computation succeeding the computation in the original deficiency letter was

there any change which had the effect of eliminating this deduction.[3]

The Commissioner moved in the court below to dismiss the taxpayers' petitions for review on the ground that they were not timely because they were not filed within 30 days after the decisions of the Board, as required by Section 1140 (c) (2) of the Internal Revenue Code, *supra*. The taxpayers urged that Section 1142, rather than Section 1140 (c) (2), provided the time for review, and that the petitions were timely under Section 1142 because they were filed within three months after the Board's decisions. The court below held that Section 1140 governed, and dismissed the petitions (R. 106–107).[4]

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[3] The statement in the opinion of the court below (R. 105) that it cannot be determined from the record what disposition was made of the $177,343.70 and $173,000 items is, we believe, clearly inaccurate.

[4] The Commissioner's computation approved by the Board contained other errors which were favorable to the taxpayers. For example, the $173,000 litigation expenses were not deducted from the gross income from the oil property in determining net income for depletion purposes. Furthermore, the computation erroneously omitted from gross income the item of $47,871.79, or nearly $8,000 per taxpayer, which was found to be income received by the taxpayers from sources other than the oil property. Although this error is not ascertainable from the printed record because the taxpayers' 1930 returns are not included in the record, it is ascertainable from a comparison of the deficiency notices and the Commissioner's computations, on the one hand, with the 1930 returns on the other. The original Board opinions required inclusion of the $47,871.79 item (33

ARGUMENT

1. Petitioners have prepared their petition for certiorari on the assumption that they were not allowed a deduction for the $173,000 litigation expenses. The analysis of the record contained in the Statement shows that this assumption is incorrect and that the claimed deduction has in fact been allowed. The only error of which petitioners may complain, therefore, is the Board's failure to exclude from the computation the $177,343.70 item for the indemnity contract. The Board should have excluded this item in its determination of the tax liability upon the first remand of the case from the Circuit Court of Appeals. However, it failed to do so, and its error in this respect was carried over into its determination of the tax liability upon the second remand.

The sole issue in the case, therefore, is whether the court below had jurisdiction to correct this error upon a petition for review filed more than 30 days, although less than three months, after the Board's final decisions were entered. The court below held that it lacked jurisdiction be-

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B. T. A. 36, 52) and the first opinion of the Circuit Court of Appeals recognized that it was a proper income item (89 F. (2d) 421, 414). No subsequent opinion of either the Board or of the court below has changed that decision or dealt in any way with the $47,871.79 item. If all mistakes were corrected, the taxable income of each taxpayer would be decreased by about $7,000, making a difference in tax and surtax of approximately $850.00.

cause of the provisions of Section 1140 (c) (2) of the Internal Revenue Code. This holding is, we believe, correct, it involves no conflict of decisions, and it presents no question calling for the consideration of this Court.

2. Section 1140 (c) (2) provides that when a decision of the Board of Tax Appeals is modified or reversed by a Circuit Court of Appeals "the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate * * *." Section 1142 relates to the ordinary petitions to review decisions of the Board, and provides that such petitions must be filed within three months of the date of the decision. Under these statutory provisions it is plain that an appeal from a decision of the Board rendered after a hearing, or a rehearing ordered by an appellate court (Section 1140 (d)), may be taken at any time within three months of the date of the decision, but that when an appeal has been taken and the case is remanded for correction of the Board's determination in accordance with the appellate court's opinion and without a rehearing, an appeal from the decision rendered upon the remand must be taken within 30 days. Since

in this case the decisions appealed from were entered upon remand from the court below, and without rehearing, Section 1140 (c) (2) is clearly applicable. *Virginia Lincoln Furniture Corp.* v. *Commissioner,* 67 F (2d) 8 (C. C. A. 4).

Taxpayers in their petition overlook the affirmative statement in Section 1140 (c) (2) that "the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final upon the expiration of 30 days" unless within those 30 days an appeal is taken. Here, the decisions were "rendered in accordance with the mandate of the court" and consequently, under the express language of the provision, became final upon the expiration of 30 days.

To avoid this conclusion, taxpayers apparently argue that Section 1140 (c) (2) lends finality, not to the decision itself, but only to that aspect of it which involves departure from the mandate of the reviewing court. This construction, however, finds no support in the statutory language and is clearly incompatible with the purpose of the provision. Furthermore, the contention erroneously assumes that a decision of the Board, rendered upon a mandate which simply instructs the Board to correct its determination in accordance with the appellate court's opinion and without rehearing, is reviewable for errors other than failure to comply with the mandate. Since the only action which the Board may take upon such a remand is to com-

ply with the directions of the reviewing court (see *Peavy-Byrnes Lumber Co.* v. *Commissioner,* 86 F. (2d) 234, 235 (C. C. A. 5), and cases cited), the only question reviewable at that point is whether in fact the Board's action did or did not conform to the mandate—the very question specifically governed by Section 1140 (c) (2). Cf. *Virginia Lincoln Furniture Corp.* v. *Commissioner, supra.*

The error in respect to the $177,343.70 item was made by the Board after the first remand. Petitioners could then have sought review of that question by the court below. Having failed to do so, it seems plain that they cannot seek review of the same question at a later stage of the litigation, simply because the Board was directed to, and did, change its decisions in another respect entirely unrelated to the $177,343.70 item.

The same conclusion is reached if the mandate of the Circuit Court of Appeals be more broadly construed so as to direct the Board to enter a proper judgment in accordance with the law of the case. If the mandate is to be so construed, the Board's failure to exclude the $177,343.70 item in accord with the law of the case was a failure to conform to the mandate. Under the specific provisions of Section 1140 (c) (2), therefore, the only remedy for the taxpayers was to have applied to the court below for review within 30 days. Having failed so to do, the court below was without jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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